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No. 98-1311

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT COAL COMPANY, *et al.*,
Petitioners,

vs.

MICHAEL HOLLAND, *et al.*,
Respondents,

and

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

A. Fifth Amendment. In the petition for certiorari (at 10-16), we explained that this Court should grant review to determine whether *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), provides a binding legal framework for assessing the constitutionality of the Coal Act and other retroactive civil statutes, or whether, as the court of appeals has held, *Eastern Enterprises* established only a specific result in a single case. Respondents offer no sound reason for denying review.

1. The trustees contend (at 11-15, 16-17) that *Eastern Enterprises*, because it produced no majority opinion, established no binding legal principles. The government disagrees. It acknowledges (at 15-16) that there *is* a "*Marks* majority" (*see Marks v. United States*, 430 U.S. 188, 193 (1977)) for the proposition that "the crucial constitutional problem in *Eastern Enterprises* was the Coal Act's application to an operator that had never signed a wage agreement promising lifetime benefits."[1]

The trustees assert that a *Marks* majority is impossible because, regardless of the critical points of agreement between the *Eastern Enterprises* plurality and concurrence, those opinions analyzed the Coal Act under different constitutional provisions. Like the court of appeals, the trustees err in reasoning that to recognize the points of agreement would be to create "'free-wheeling'" constitutional claims. Opp. at 14, quoting *Association of Bituminous Contractors v. Apfel*, 156

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[1] As explained in the petition for certiorari (at 11-13), a *Marks* majority is present because the *Eastern Enterprises* plurality and concurrence, although reasoning from different premises, *explicitly agreed* that retroactive economic legislation is unconstitutional if it imposes (1) a substantial liability (2) based on conduct far in the past and (3) unrelated to past promises made (4) or injuries caused by the burdened party. *See* 118 S. Ct. at 2149-53 (plurality); *id.* at 2158-60 (concurrence). As the government's formulation recognizes, the first, second, and fourth elements of this rule are obviously satisfied here, and the only open question involves application of the third.

F.3d 1246, 1253-54 (D.C. Cir. 1998) ("*ABC*"). Where four Justices would find an unconstitutional taking, and where at least one additional Justice would find a deprivation of due process, the appropriate result is not to uphold application of the statute in question (as the trustees' approach would require), but to invalidate that application (as this Court did in *Eastern Enterprises* itself). As explained in the petition (at 14), *Marks* plainly applies in these circumstances.

2. Within the legal framework established by *Eastern Enterprises*, the government attempts (at 2-3, 11, 15-16) to defend the decision below on the ground that the post-1974 NBCWAs, which Robert Coal signed, promised lifetime benefits. That is incorrect because, as explained in the petition (at 23), at least five different contractual provisions limited the promised benefits to the term of each agreement. In *Unity Real Estate Co. v. Hudson*, 1999 WL 167765, *15 (3d Cir. Mar. 29, 1999), the Third Circuit confirmed that the post-1974 NBCWAs did not "guarantee that the coal companies would pay for lifetime benefits." Concurring in the judgment, Judge Aldisert also stressed that the post-1974 NBCWAs "expressly limited all of the promised retiree health benefits to the term of each agreement," and that those agreements contain "no evidence of any 'promise' of lifetime benefits." *Id.* at *31.[2]

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[2] With "substantial hesitation" (1999 WL 167765 at *1), the *Unity* court held that the Fifth Amendment does not bar application of the Coal Act to signatories of the post-1974 NBCWAs. The majority reasoned that, even though the post-1974 NBCWAs themselves made no promise of lifetime benefits, a "reasonable expectation" could have arisen from the parties' "course of conduct" in renewing successor agreements "for decades." *See id.* at *14-*16 & *18 n.9. That argument was rejected in *Eastern Enterprises*, where the NBCWAs at issue had been renewed for approximately two decades. *See* 118 S. Ct. at 2142-43 (plurality). The *Unity* concurrence reasoned that, although there was "no evidence of any 'promise' of lifetime benefits," the Coal Act could be sustained on the ground that the Coal Commission had unreasonably concluded otherwise. *See* 1999 WL 167765, at *30-*31. That argument also was rejected in

The trustees similarly contend (at 18-20) that *Eastern Enterprises* itself concluded that the post-1974 NBCWAs had promised lifetime benefits. Because Eastern last signed an NBCWA in 1964, *see* 118 S. Ct. at 2143 (plurality), this Court had no occasion to construe the post-1974 NBCWAs, and thus twice reserved the question whether the Coal Act is constitutional as applied to signatories of those agreements. *See id.* at 2142, 2153; *see also id.* at 2159 (concurrence). The trustees' quotation of passing references to the post-1974 NBCWAs simply confirms this Court's agnosticism on a question not before it. *See, e.g.*, 118 S. Ct. at 2150 (plurality) (post-1974 NBCWAs "first *suggest* an industry commitment to the funding of lifetime health benefits" (emphasis added)); *id.* at 2152 ("Not until 1974 . . . *could* lifetime medical benefits . . . have been viewed as promised." (emphasis added)).

3. The trustees assert various additional reasons why the Fifth Amendment question is not well presented. First, they contend (at 6-11) that petitioners failed to preserve their claim below. In the district court, however, petitioners based their Fifth Amendment claims not only on the Kentucky final judgment, as the trustees stress, but also on the absence of any prior promise of lifetime health benefits.[3] Petitioners renewed these

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Eastern Enterprises, where the Coal Commission had unreasonably discerned a promise of lifetime benefits made "nearly 50 years ago" (*i.e.*, decades before 1974). *See* 118 S. Ct. at 2141 (plurality). Respondents make no attempt to defend either of these flawed rationales.

[3] *See, e.g.*, Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 32 (takings) ("Robert did not make any promise to provide lifetime health benefits to its retirees."); *id.* at 38 (due process) ("Robert Coal, without any legal or contractual obligation to do so, voluntarily provided health benefits to its retirees from 1988 until January 31, 1993.").

arguments in the court of appeals.[4] Moreover, even if petitioners had not raised these claims below, they would nonetheless be properly presented because both the district court (Pet. App. 16a-24a) and the court of appeals (Pet. App. 1a-3a) squarely addressed them. *See, e.g., Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

The trustees further contend (at 16) that the court of appeals' controlling opinion in *ABC* did not limit *Eastern Enterprises* to a "specific result" in a single case. In *ABC*, however, the court stated that "the only binding aspect of *Eastern Enterprises* is its specific result — holding the Coal Act unconstitutional as applied to Eastern Enterprises"; it further stated that "our basic inquiry in resolving [a] due process challenge remains the same after *Eastern Enterprises* as it was before"; and it upheld the Coal Act "for many of the same reasons that our sister circuits have articulated," citing as persuasive authority several pre-*Eastern* decisions upholding the Coal Act even as applied to signatories of pre-1974 NBCWAs, including the reversed First Circuit opinion in *Eastern Enterprises* itself. *See* 156 F.3d at 1255. The trustees cannot obscure *ABC's* evisceration of *Eastern Enterprises*.

The trustees also contend (at 15) that the decision below "did not depend on *ABC*." The court of appeals, however, twice cited *ABC* explicitly. Pet. App. 1a-3a. Moreover, that court's further citation of the district court's opinion confirms

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[4] *See, e.g.*, Brief of Appellants at 31 (takings) ("In Robert Coal's situation, since it last signed the 1981 NBCWA, its obligation to provide retiree health benefits to its retirees expired in 1984."); *id.* at 35 (due process) ("Robert Coal, without any legal or contractual obligation to do so, voluntarily provided benefits to its retirees from 1988 until January 31, 1993."). Although the trustees assert (at 10) that petitioners "disclaimed reliance" on *Eastern Enterprises*, petitioners in fact argued that its rationale "is equally applicable to Robert Coal, which had no contractual obligation to provide retiree health benefits after 1984." *Id.* at 33.

that it does not view *Eastern Enterprises* as binding precedent, for the district court, like *ABC*, relied heavily on pre-*Eastern* decisions upholding the Coal Act even as applied to signatories of pre-1974 NBCWAs. Pet. App. 17a-23a.

4. Finally, the government (at 16 n.3) and the trustees (at 20-21) err in contending that the decision below can be reconciled with *Mary Helen Coal Corp. v. Hudson*, 1998 WL 708687 (4th Cir. Sept. 24, 1998). By applying *Eastern Enterprises* in a "materially indistinguishable" case (*id.* at *1), the Fourth Circuit necessarily rejected the D.C. Circuit's position that *Eastern Enterprises* governs only a single case. To be sure, *Mary Helen* raises the question whether pre- and post-1974 NBCWAs are "materially" distinguishable within the legal framework established by *Eastern Enterprises*. Because the post-1974 NBCWAs made no "'promise' of lifetime benefits," *see Unity*, 1999 WL 167765, at *31 (concurrence), that question must be answered in the negative. Applying *ABC*, however, the court of appeals never reached that question.

This Court should grant the petition for certiorari to determine whether *Eastern Enterprises* established legal principles applicable beyond the judgment in that case.

B. Separation of Powers. In the petition for certiorari (at 16-20), we explained that the Court should grant review to consider whether the separation-of-powers principles recognized in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), bar application of the Coal Act to nullify the Kentucky final judgment. Respondents oppose certiorari primarily based on the broad and dubious theories adopted below.

First, the government (at 17-18) and the trustees (at 22-23) contend that the decision below is correct because the statutory obligations retroactively imposed on Robert Coal are "new." However, respondents do not dispute that those obligations were explicitly "modeled on" (Pet. App. 14a) the expired NBCWAs directly at issue in the Kentucky litigation. Nor do

respondents dispute that the asserted constitutional justification for retroactive Coal Act liability is the alleged fit between the "new" statutory obligations and the "old" contractual obligations. *See, e.g., Eastern Enterprises*, 118 S. Ct. at 2152-53 (plurality). As explained in the petition (at 18-19), *Plaut* would be a dead letter if it were inapplicable in these circumstances.[5]

The trustees also suggest (at 21-22) that *Plaut* is inapplicable because the Kentucky judgment arose in a contract case. *Plaut*'s protection against legislative interference with final judgments, however, does not depend on the "source of the legal rule that produced the Article III judgments." 514 U.S. at 230. The trustees' authority establishes only that existing judgments do not prevent Congress from legislating *prospectively*. *See, e.g., Fleming v. Rhodes*, 331 U.S. 100, 107 (1947) (state-court judgment); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435-36 (1855). Those principles do not apply here, where the legislative interference is retroactive, and where Article III courts are at issue. *See Plaut*, 514 U.S. at 232 ("[t]hose cases distinguish themselves").

Finally, the trustees contend (at 5, 23-24) that *Plaut* is inapplicable because the extent of Robert's contractual liability was determined in a settlement agreement not explicitly incorporated into the Kentucky judgment. However, the judgment by its terms was "based on" the settlement agreement (Pet. App. 38a), and the Kentucky court expressly "approved" the settlement agreement (Pet. App. 40a) and made it an exhibit to the judgment (Pet. App. 40a-41a). That was more than enough to incorporate the settlement agreement into the judgment.

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[5] The trustees contend (at 23) that *Plaut* cannot apply because only the UMWA, and not the 1992 Benefit Plan, was a party to the Kentucky litigation. The 1992 Benefit Plan is, however, a successor in interest to the funds that the UMWA had previously administered under the expired NBCWAs. *See* 26 U.S.C. § 9712(b)(2)(A) and (c)(1).

See, e.g., Interspiro USA, Inc. v. Figgie Int'l Inc., 18 F.3d 927, 930 (Fed. Cir. 1994) ("a court is not required to use explicit language or 'any magic form of words' to effect a valid incorporation of an agreement into an order"); *Bostick Foundry v. Lindberg*, 797 F.2d 280, 283 (6th Cir. 1986) (settlement agreement "incorporated in the district court record" is "as binding, conclusive, and final as if it had been incorporated into a judgment").[6]

The Court should grant certiorari to determine whether Congress can evade *Plaut* by creating "new" retroactive liabilities modeled on obligations previously extinguished, at least here, by the final judgment of an Article III court.

C. Appointments Clause. As explained in the petition for certiorari (at 20-24), this Court should grant review to determine whether the settlers and trustees of the 1992 Benefit Fund, who were not properly appointed under the Appointments Clause, but who nonetheless exercise significant authority pursuant to the Coal Act, are "Officers of the United States" for Appointments Clause purposes. Respondents do not dispute the importance of that question, but argue that the decisions below are correct on the merits.

1. The government (at 19-20) and the trustees (at 24-25) contend that only a permanent federal employee can be an "Officer of the United States." That argument is inconsistent with *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam), which held that "*any* appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States'" subject to the Appointments Clause" (emphasis added), and with *Morrison v. Olson*, 487 U.S. 654, 671 n.12

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[6] There is no material difference between the order at issue in *Interspiro*, which dismissed a case "pursuant to" a settlement agreement (18 F.3d at 930), and the Kentucky final judgment at issue here, which dismissed a case "based on" a settlement agreement (Pet. App. 38a).

(1988), which held that an independent counsel "*is* an 'Officer' of the United States, *not* an 'employee'" (emphases added). As explained in the petition (at 20-22), "Officer" status turns on the nature of powers exercised by the individual in question, not whether the individual is a federal employee.[7]

Contrary to its present position, the government for years maintained, in a series of formal opinions promulgated by the Office of Legal Counsel ("OLC"), that the Appointments Clause *does* apply to individuals, other than federal employees, who exercise "'significant authority pursuant to the laws of the United States.'" 13 Op. O.L.C. 248, 249 (1989) (Barr, AAG), quoting *Buckley*, 424 U.S. at 126.[8] Although the current administration recently overruled these decisions *en masse*, *see* 1996 WL 876050 at 109, 116 (O.L.C.) (May 7, 1996), even it

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[7] The government's authority on this point (at 20) is inapposite. In *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393-94 (1867), the only question presented was whether permanent employment was sufficient (not necessary) to make the official in question an "Officer" for purposes of an embezzlement statute. In *United States v. Germaine*, 99 U.S. 508, 511-12 (1878), the individual in question was a surgeon who merely examined patients, and thus exercised no governmental power at all. Finally, in *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890), the individual in question was described as a "expert assistant" retained by tax officials to make a one-time appraisal of goods.

[8] *See, e.g.*, 14 Op. O.L.C. 154, 155 (1990) (Luttig, AAG) (Appointments Clause applies to private parties charged with determining applicability of federal statute); 14 Op. O.L.C. 94, 99 (1990) (federal contractors not appointed under Appointments Clause "may not determine the policy of the United States, or interpret and apply federal law in any way that binds the United States or affects the legal rights of third parties"); 13 Op. O.L.C. 207, 221 (1989) (Appointments Clause applies to *qui tam* relators) ("exercises of significant governmental power must be carried out by 'Officers of the United States,' duly appointed under the Appointments Clause"); 11 Op. O.L.C. 73, 74 (1987) (Congress cannot give state officials "not appointed in accordance with the Appointments Clause . . . the authority to waive a federal statute").

acknowledged that *Buckley* "used language" that "might suggest that the Appointments Clause applies to persons who, although they do not hold positions in the public service of the United States, exercise significant authority pursuant to federal law," *id.* at 29. The frequency with which this question has arisen, the controversy it has provoked within the executive branch, and the weight of executive precedent contrary to the government's current position all confirm that this Court should finally resolve the Appointments Clause question.

2. Alternatively, the trustees contend that they exercise no significant "governmental" authority in administering the 1992 Benefit Fund. First, the trustees argue (at 26, 27) that Congress itself made all significant decisions regarding eligibility for benefits and assessment of premiums. However, the Coal Act does *not* determine premium amounts, but makes former NBCWA signatories liable for "contribution requirements established in the 1992 UMWA Benefit Plan." 26 U.S.C. § 9712(d)(1). Moreover, although Congress established general parameters for determining eligibility (*id.* § 9712(b)(2)) and making assignments (*id.* § 9712(d)), these statutory terms are hardly self-executing, and substantial litigation has arisen from the trustees' interpretations and enforcement decisions.[9] In making those decisions, the trustees perform the quintessentially executive function of what *Buckley* described as "fleshing out the statute" (424 U.S. at 137).

Second, the trustees argue that their concededly broad powers to design the 1992 Benefit Plan (at 26-27) and litigate on its behalf (at 27-28) are no different from powers exercised

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[9] *See, e.g., Olga Coal Co. v. Connors*, 159 F.3d 62, 66-67 (2d Cir. 1998) (whether § 9712(d)(2) incorporates "in business" requirement); *Holland v. Keenan Trucking Co.*, 102 F.3d 736, 742-43 (4th Cir. 1996) (scope of "related person" liability under § 9712(d)(4)); *Holland v. High-Tech Colleries, Inc.*, 911 F. Supp. 1021, 1028-29 (N.D. W.Va. 1996) (definition of "last signatory operator" under § 9712(d)(3)).

by administrators of private welfare plans. When private administrators perform these tasks, however, they merely enforce voluntary obligations created with employer consent. *See, e.g., Lockheed Corp. v. Spink*, 517 U.S. 882, 886 (1996) ("Nothing in ERISA requires employers to establish employee benefit plans."). But when the trustees perform these tasks for the 1992 Benefit Plan, they determine the extent and enforcement of what the courts of appeals have correctly characterized as an "'involuntary'" scheme of federal taxation. *See In re Sunnyside Co.*, 146 F.3d 1273, 1276 (10th Cir. 1998) (citation omitted). Such enforcement is also a quintessentially executive power.[10]

Finally, the trustees (at 25) stress that the Coal Act describes the 1992 Benefit Plan as a "private plan." However, Congress cannot "make the final determination," for constitutional purposes, whether the powers at issue are "private" or "governmental" in nature. *See Lebron*, 513 U.S. at 392. For the reasons set forth above, they are obviously the latter.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[10] The government errs (at 20) in analogizing the 1992 Benefit Plan to "private corporations" such as the Federal National Mortgage Association ("FNMA") or the Student Loan Marketing Association ("SLMA"). Those entities engage in "cooperative agreements," such as renting property or selling debt, to advance their missions. 12 U.S.C. § 1723a(a) (FNMA); *see also* 20 U.S.C. § 1087-2(d) (SLMA). The trustees' attempt (at 28-29) to analogize themselves to "every gas station that collects gasoline taxes" is almost frivolous because, among other reasons, such collectors neither design the scheme of taxation at issue nor sue to enforce it.

Respectfully submitted,

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